Supreme Court, U.S.
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NO. 89-1483

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GLENN D. RAMIREZ,

Petitioner,

vs.

OREGON STATE BAR,
OREGON STATE BAR PROFESSIONAL LIABILITY FUND,

Respondents.

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITY

Hass v. Oregon State Bar (1989)
Ninth Circuit Court of Appeal 1, A-24

The Respondents, in their Brief, have relied and quoted extensively from their recent case, Hass v. Oregon State Bar, and has submitted a copy of the Opinion as Appendix C to their Brief. This case involved a Complaint that the Plaintiff could get the insurance cheaper, if not required to buy it, from the Defendants. The Trial Magistrate and the Circuit Court of Appeals for the Ninth Circuit expanded this into an Anti-Trust issue and the United States Supreme Court denied certiorari.

The fact of jurisdiction cannot be collaterally challenged and the fact that Mr. Hass was prohibited by law from buying the insurance cheaper from another source under the facts which he alleged had been decided. However the constitutional issues presented in the instant case were not decided.

A copy of the Stipulation for decision in the Hass case is submitted herewith as Petitioner's Appendix D attached hereto.

The question is not whether or not Petitioner can get insurance at a cheaper price, but whether or not the government can curtail its regulation

under the United States Constitution by encumbering lawyers who would defend it with an unconstitutional insurance assessment.

CONCLUSION

Because of the serious constitutional potential infringements caused by the requirement that private lawyers pay insurance assessments to the Bar to represent persons in seeking redress from the government for wrongs done to them, certiorari should be granted to decide or to remand for decision the constitutionality of the Bar insurance assessment permitted in Oregon under ORS 9.080. Later may be too late, and if not too late, would certainly aggravate damages sustained by the public, their attorneys, and in the final analysis, the Judiciary.

Dated this 30th day of April, 1990.

GLENN D. RAMIREZ
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DISTRICT OF OREGON
BY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FRED HASS,

Plaintiff,

v.

OREGON STATE BAR,

Defendant.

Civil No. 87-196-LE

STIPULATION

For the purpose of submitting all of the claims asserted in plaintiff's Complaint and the defenses tendered by the defendant's Answer to the court for adjudication, the parties hereby stipulate that for the purpose of this submission, the following facts are true.

1. In this action, plaintiff seeks declaratory and injunctive relief, which plaintiff claims is available under 28 USC §§ 2201, 2281, and 2284.

2. Plaintiff claims this Court has jurisdiction of

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plaintiff's First Claim for Relief [Interstate Commerce] by virtue of 28 USC §§ 1331, 2201, and 2281.

3. This Court has jurisdiction of plaintiff's Second Claim for Relief [Monopoly] pursuant to 15 USC § 26.

4. The plaintiff was admitted to practice law in the state of Oregon in 1981, is presently practicing in the city of Portland, Oregon, and has heretofore contributed to the Professional Liability Fund all assessments made by the defendant. Plaintiff is presently a member in good standing of the Oregon State Bar.

5. The defendant was and is a public corporation and an instrumentality of the Judicial Department of the state of Oregon. Defendant may sue and be sued.

6. Defendant's office and the office of its Executive Secretary are in the city of Lake Owego, Clackamas County, Oregon.

7. In 1977, the Legislative Assembly passed an Act, subsequently codified as ORS 9.080, which provides as follows:

> "(2)(a) the board [Board of Bar Governors] shall have the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and shall be empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyers professional liability fund."

8. In 1977, the Board of Bar Governors passed a resolution

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providing in part as follows:

> "1. Effective July 1, 1978, all active members of the Oregon State Bar engaged in the private practice of law in Oregon shall carry professional liability coverage with aggregate limits of not less than $100,000.00 ... .
>
> "2. Such professional liability coverage for all active members engaged in the private practice of law in Oregon, except patent atorneys, shall be obtained through the Oregon State Bar Professional Liability Fund ... ."

9. Following said enactment and the adoption of said resolution, the defendant, through its Professional Liability Fund, commenced providing insurance coverage for legal malpractice to active members of the Oregon State Bar engaged in the private practice of law in the State of Oregon. Contemporaneously therewith, said members have been required to carry a minimum amount of coverage. The cost of said coverage is assessed by the Board of Directors of the Professional Liability Fund, approved by defendant, and paid to the Professional Liability Fund.

10. In each year following 1977, attorneys engaged in private practice in the State of Oregon have been required to contribute the amounts assessed, and the Professional Liability Fund has provided insurance for legal malpractice.

11. Plaintiff, together with all attorneys in private practice in Oregon, are required to participate in the Professional Liability Fund Plan. Failure to participate shall result in suspension from membership in the Bar pursuant to ORS 9.200.

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12. Plaintiff has made all contributions necessary to pay Professional Liability Fund assessments for each year plaintiff has been in private practice, and plaintiff is presently making said contributions on a quarterly basis.

13. In 1977, just prior to the time defendant's Professional Liability Fund Plan went into effect, approximately 35% of the attorneys in private practice in the State of Oregon were without any legal malpractice insurance coverage.

14. The administration and operation of the Professional Liability Fund is actively supervised by the defendant. Direction and supervision of the Professional Liability Fund is provided by a Board of Directors appointed by defendant, and directed by the defendant.

15. The Oregon State Bar Professional Liability Fund currently has in effect one minimum legal malpractice insurance plan, a copy of which is attached hereto.

16. If called to testify, plaintiff will testify to the facts set forth in his affidavit.

STIPULATED TO:

BLOOM & SPAULDING

Date: April 6 1978 By _____
Michael H. Bloom
Of Attorneys for Plaintiff

McEWEN, GISVOLD, RANKIN & STEWART

Date: April 6, 1978 By _____
Janice M. Stewart
Of Attorneys for Defendant

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OREGON STATE BAR

PROFESSIONAL LIABILITY FUND

CLAIMS MADE PLAN

January 1, 1987

Oregon State Bar
Professional Liability Fund
Suite 200 — 1221 S.W. Yamhill Street
Portland, OR 97205

Telephone: (503) 224-4355
Toll Free 1-800-452-1639

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INTERPRETATION OF THIS PLAN

The bracketed titles appearing throughout this Plan are not part of the Plan and should not be used as an aid in interpreting the Plan. The bracketed titles are intended simply as a guide to aid the reader in locating pertinent provisions.

In contrast, the discussions labeled "COMMENTS" following various provisions of the Plan are intended as aids in interpretation. These interpretive provisions add background information and provide additional considerations to be used in the interpretation and construction of the Plan.

Throughout this Plan:

(a) the words "YOU" and "YOUR" refer to the Named Party shown in the Declarations,

(b) the words "WE," "US" and "OUR" refer to the Professional Liability Fund of the Oregon State Bar,

(c) the words "COVERED PARTY" refer to any person or organization qualifying as such under Section II — WHO IS A COVERED PARTY, and

(d) the words "COVERED ACTIVITY" refer to conduct qualifying as such under Section III — WHAT IS A COVERED ACTIVITY.

Other words and phrases that appear in all capital letters have special meaning. Refer to Section IV — DEFINITIONS.

COMMENTS

History. The Professional Liability Fund was originally created pursuant to enabling legislation empowering the Board of Governors of the Oregon State Bar to establish an indemnity system for attorneys. The object of this program was to provide mandatory coverage at minimum cost to attorneys while assuring the public that each attorney in private practice would have certain minimum levels of protection. The determination of the scope of the protection afforded was to be determined by the Board of Governors and/or its designee. See ORS 9.080(2)(a) and its legislative history. The PLF was empowered to do whatever was reasonable and necessary to achieve this objective. See, e.g., *Balderree v. OSB*, 301 Or 155, 719 P2d 1300 (1986). Pursuant to this authority, the PLF has adopted this Plan.

Claims-made Form. The Plan is a claims-made indemnity agreement similar in form to current plain language insurance policies. The Plan is a contractual agreement between the PLF and the individual attorney to whom it is issued.

Plan Is Not an Adhesion Contract. Traditionally, indemnity agreements have been subject to court interpretation construing all ambiguities against the author of the form. However, not all insurance contracts are treated as contracts of adhesion. For example, the Bankers Blanket Bond issued by

insurers to individual banks electing to purchase this coverage was developed through negotiations between banking industry representatives and representatives of the insurance industry. Courts have recognized that because of the arms length nature of these negotiations, the Bankers Blanket Bond is not a contract of adhesion and the usual rule construing ambiguities against the insurer is inappropriate. Likewise, the PLF Plan was developed by attorneys who are themselves covered by the Plan and are appointed by the elected and appointed representatives of the Oregon State Bar. The developers of the Plan have received substantial input directly from the membership. It is accordingly inappropriate to treat this Plan as a contract of adhesion.

Purpose of Bracketed Titles. In Section I(3) of the Plan WE have attempted to group exclusions according to subject matter. Bracketed titles have been inserted designating the subject matter of the exclusions which follow the title. These bracketed titles are simply for the convenience of the reader in locating applicable exclusions. Such titles are not part of the Plan and should not be used as an aid in interpretation. The titles neither expand nor reduce the scope of the exclusions which follow. Likewise, the titles do not imply any limitation on the applicability of other exclusions. Thus, the fact an exclusion does not fall under the title "business risk," for example, does not mean the exclusion will not be applicable in a business risk situation. Likewise the bracketed titles in Section III are not intended to alter the meaning of that Section.

Purpose of Comments. These Comments are similar in form to the UCC and Restatements. They are intended to aid in the construction of the Plan language. By the addition of these Comments, we hope to avoid the existence of any ambiguities, to assist attorneys in interpreting the coverage available to them, and to provide a specific basis for interpretation by judges and arbitrators.

Retroactivity. Because this is a claims-made Plan, unless specifically stated otherwise in the Comments, the coverage available to the COVERED PARTY is determined by the terms of the Plan in force at the time the claim is first made, not the terms of the Plan in force at the time of the act, error or omission giving rise to the claim.

SECTION I — COVERAGES

1. Coverage Grant.

   a. WE will pay those sums that the COVERED PARTY becomes legally obligated to pay as damages because of CLAIMS arising out of a COVERED ACTIVITY to which this Plan applies. No other obligation or liability to pay sums or perform acts or services is covered unless specifically provided for under Paragraph 2 — Supplementary Coverage.

   b. This Plan applies only to CLAIMS first made against a COVERED PARTY during the COVERAGE PERIOD.

      (1) A CLAIM seeking damages will be deemed to have been made when an ACTION is filed or initiated, when notice of such CLAIM is received by any COVERED PARTY or by US, or at such time as the COVERED PARTY knew or should have known that a COVERED ACTIVITY could result in a CLAIM, whichever comes first.

      (2) Two or more CLAIMS arising out of a single COVERED ACTIVITY or arising out of a series of related COVERED ACTIVITIES, whenever made, shall be deemed to have been first made at the time the earliest CLAIM arising out of any such COVERED ACTIVITY was first made.

   c. This Plan applies only to ACTIONS brought in the United States, its territories or possessions, or Canada.

   d. This Plan does not apply to a COVERED PARTY who participates in any manner in the presentation of any false, fraudulent or collusive CLAIM or assertion of coverage.

   e. The amount WE will pay for damages is limited as described in Section VI — LIMITS OF COVERAGE AND DEDUCTIBLE.

   f. Coverage under this Plan is conditioned upon full and timely payment of all assessments owed by YOU.

COMMENTS

Outline of Section I. Section I.1. defines the PLF's obligation to indemnify for damages a Covered Party is legally obligated to pay. Section I.2. defines certain additional coverages which are extended. Section I.3. sets out the exclusions to coverage. Section I.4. defines your right to purchase extended reporting coverage to protect against claims made in future years.

Use of Capitals. The capitalized terms used in this section and other sections of the Plan are defined in Sections II, III, and IV. The definition of COVERED PARTY appearing in Section II and the definition of COVERED ACTIVITY appearing in Section III are particularly crucial to the understanding of the coverage grant.

Claims-made Form. This is a claims-made Plan. It applies to claims first made during the time period shown in the Declarations. Claims first made either prior to or subsequent to that time period would not be covered by this Plan although they may be covered by a prior or subsequent Plan.

When Claim First Made; Multiple Claims. Subparagraph b(1) of this section is intended to make clear that the earliest of the several events listed determines when the claim is first made. Subsection b(2) states a special rule applicable when several claims arise out of the same or related activities. Under this rule, all such claims are considered first made at the time the earliest of the several claims is first made. Thus, regardless of the number of claimants asserting claims, the number of claim years involved, or the number of transactions giving rise to the claims, all such claims are treated as first made in the earliest applicable Plan year and only one limit of liability applies.

Failure to Pay Assessments. Under subparagraph f., failure to pay applicable assessments when due eliminates coverage for any claim made after the date of such failure. Thus, if YOU failed to pay the assessment due by January 1 until March 1, YOU would have no coverage under this Plan for claims first made between January 1 and March 1.

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2. Supplementary Coverage.

   a. Until the LIMITS OF COVERAGE extended by this Plan are exhausted, WE will defend any ACTION against a COVERED PARTY seeking damages to which this coverage applies. WE have the sole right to investigate, settle, designate defense attorneys and otherwise conduct the defense of any CLAIM. However, failure on OUR part to settle a CLAIM within the LIMITS OF COVERAGE shall not create any additional obligation on OUR part in contract, tort or otherwise, regardless of the amount of any judgment or award subsequently entered against YOU or any other COVERED PARTY.
   b. With respect to any ACTION we defend, WE will pay all CLAIMS EXPENSE WE may incur. These payments shall reduce the LIMITS OF COVERAGE.

COMMENTS

Scope of Duty to Defend. Subsection a. of this section defines OUR obligation to defend. The obligation to defend continues only until the LIMITS OF COVERAGE are exhausted.

Cost of Defense. Subsection b. obligates the PLF to pay costs of defense. Only those expenses incurred by or with OUR authority are covered.

Control of Defense. Subsection a. also allocates to the PLF control of the investigation, settlement and defense of the claim.

No Implied Duty of Good Faith. The final sentence of subsection a. eliminates any duty WE might otherwise have to settle claims within the LIMITS OF COVERAGE. Traditional insurance law infers from the power to control the defense and settlement of the claim an implied duty on the insurer to act in good faith in carrying out this responsibility. This implied duty renders the insurer liable for negligent conduct which results in the insured suffering an excess judgment. See, e.g., *Maine Bonding v. Centennial Ins. Co.*, 298 Or 514, 693 P2d 296 (1985). One aspect of this duty is a duty to settle within policy limits whenever there is a reasonably foreseeable risk that the insured will suffer an excess judgment if the claim is not settled.

WE are exempt from insurance laws and are not an insurance company. The implied contractual obligations imposed upon insurers in their relationship with unsophisticated insureds is inappropriate to the relationship between US and the attorney WE cover. Attorneys are sophisticated consumers and can make reasoned decisions respecting the risk of excess exposure. Attorneys who wish to avoid the risk of an excess judgment can usually do so by purchasing additional coverage from an excess insurer.

Furthermore, the PLF Board of Directors is ordinarily involved in decisions respecting the settlement of any case with realistic excess exposure. Since the Board is appointed by the Board of Governors of the Oregon State Bar and, as such, is the chosen representative of the attorneys covered by US, there is no reason to anticipate either the Board or the staff working for it would recklessly or maliciously expose an attorney to an excess judgment. Accordingly, WE believe the imposition of a duty of good faith on US is an inappropriate use of the assessments paid by the attorneys covered by US.

Subsection a., therefore, expressly provides that the traditional duty to settle implied in the typical insurance policy is not available. There is no implied duty to settle; on the contrary, there is an express disclaimer of any such duty.

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3. Exclusions.
[CERTIFICATE OF EXEMPTION EXCLUSION]

   a. This Plan does not apply to any CLAIM based upon or arising out of YOUR conduct during a period of time for which YOU have been granted a certificate of exemption by US.

COMMENTS

Only attorneys engaged in the "private practice of law" in Oregon are eligible for or mandated to carry coverage with the PLF. ORS 9.080(2)(a). An attorney not engaged in the private practice of law in Oregon can avoid the mandatory purchase of coverage by filing with US a certificate showing the attorney is not subject to the mandate. This provision makes clear that YOUR conduct during the period of any such exemption is not covered even though the conduct would otherwise be a COVERED ACTIVITY. For example, if you held a certificate of exemption during calendar year 1986 and a claim was later made against you for conduct during 1986, this Plan would not apply even though the claim was first made during this PLAN PERIOD.

[WRONGFUL CONDUCT EXCLUSIONS]

b. This Plan does not apply to any CLAIM based upon or arising out of:

(1) any intentional, dishonest, fraudulent, criminal, malicious or knowingly wrongful acts, errors or omissions committed by YOU or at YOUR direction or in which YOU acquiesce or remain passive after having personal knowledge thereof, or

(2) criminal conduct committed by someone for whose conduct YOU are legally liable.

COMMENTS

This exclusion states two rules. Subsection (1) sets out the circumstances in which YOUR own wrongful conduct will eliminate coverage. Subsection (2) sets out the circumstances in which YOUR vicarious liability for the conduct of others is not covered. We have excluded YOUR vicarious liability for the criminal conduct of others. This exclusion applies whether or not the actor is in fact convicted of a crime so long as the conduct is in fact criminal.

Primary responsibility to compensate for criminal conduct of another attorney more appropriately rests with that attorney and the Client Security Fund. WE have excluded YOUR vicarious liability for the consequences of such conduct because we believe such conduct is more appropriately covered by your purchase of a fidelity bond. In that way those who need protection against criminal conduct of their partners, employees and fellow-shareholders can acquire that protection at their own expense and without increasing the assessments of those required to carry coverage with US but not desiring protection from criminal conduct of others.

For a case discussing YOUR potential liability for the criminal conduct of a partner, see *Roach v. Mead*, 301 Or 383, 722 P2d 1229 (1986).

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c. This Plan does not apply to any CLAIM based upon or arising out of a proceeding brought against YOU by the Oregon State Bar or any similar entity.

COMMENTS

WE are not in the business of defending bar disciplinary proceedings. This exclusion makes clear there is no duty to defend such claims even if the facts giving rise to the claim involve a COVERED ACTIVITY.

---

d. This Plan does not apply to that part of any CLAIM:

(1) asserted directly against a COVERED PARTY for punitive or exemplary damages, fines, sanctions or penalties, or

(2) asserted directly or indirectly against a COVERED PARTY, arising out of the imposition on the COVERED PARTY or others of any attorneys fees, costs, fines, penalties, sanctions or other amounts imposed under any federal or state statute, administrative rule, court rule or case law intended to penalize bad faith conduct and/or the assertion of frivolous or bad faith claims or defenses.

COMMENTS

A COVERED PARTY may become subject to punitive or exemplary damages, fines, sanctions and penalties in two ways. The COVERED PARTY may have these damages assessed directly against the COVERED PARTY or the COVERED PARTY may have a client or other person sue the COVERED PARTY for indemnity for causing the client to be subjected to these damages.

Subsection (1) of this exclusion applies to direct actions against the COVERED PARTY. It excludes coverage for that part of any claim asserting such damages. For example, if YOU are sued for punitive damages, YOU are not covered.

Subsection (2) of this exclusion applies to both direct actions against a COVERED PARTY and actions for indemnity brought by others. The damages excluded from coverage, however, are limited under this subsection to various penalties and sanctions intended to penalize bad faith conduct or the assertion of frivolous or bad faith claims or defenses. The courts have become increasingly intolerant of attorneys' improper actions in several areas including trial practice, discovery and conflicts of interest. Statutes, court rules and common law approaches imposing various monetary sanctions have been developed to deter such inappropriate conduct. The purpose of these sanctions would be threatened if WE were to indemnify the guilty attorney and pay the cost of indemnification out of the assessments paid by all attorneys.

Thus, if YOU cause YOUR client to be subjected to a punitive damage award (based upon the client's wrongful conduct toward the claimant) because of a failure, for example, to assert a statute of limitations defense, WE will cover YOUR liability for the punitive damages suffered by YOUR client. Subsection (1) does not apply because the action is not a direct action for punitive damages and subsection 2 does not apply because the punitive damages suffered by YOUR client are not the type of damages described in subsection (2).

On the other hand, if YOU cause YOUR client to be subjected to an award of attorneys fees under Rule 11 of the Federal Rules of Civil Procedure or under ORS 20.105 or 20.125 or other similar statute, subsection (2) applies and the claim for such damages will be excluded.

[BUSINESS ACTIVITY EXCLUSIONS]

e. This Plan does not apply to that part of any CLAIM based upon or arising out of YOUR conduct as an officer, director,

partner, trustee, employee, or shareholder of any entity except an Oregon law professional corporation.

COMMENTS

A COVERED PARTY, in addition to his/her role as an attorney, may clothe himself/herself as an employee, partner, officer, director or trustee of an entity. This exclusion eliminates coverage for the COVERED PARTY'S liability while acting in these capacities. However, the exclusion does not apply if the liability is based upon such status in an entity dedicated to the practice of law such as a law firm partnership or professional corporation. The term "Oregon law professional corporation" as used in this exclusion refers to an Oregon corporation or partnership engaged solely in the practice of law.

f. This Plan does not apply to any CLAIM by or on behalf of any business enterprise which is owned by YOU or in which YOU are a partner or employee, or which is controlled, operated, or managed by YOU either individually or in a fiduciary capacity, including the ownership, maintenance or use of any property in connection therewith. For purposes of this exclusion, "owned" shall not include a ten percent or less interest held by YOU and those YOU control.

COMMENTS

Experience indicates that a certain level of intimacy with a client can result in an increased risk of loss because of two factors: (1) the attorney's services may be rendered in a more casual and less thorough manner than if the services were extended at arms length and (2) after a loss, the attorney may feel particularly motivated to assure the client's recovery. WE have been exposed to a surprising number of claims because of these two factors. While WE are cognizant of a natural desire of attorneys to serve those with whom YOU are closely connected, WE have determined that coverage for such services should be excluded. Exclusion f. delineates the level of intimacy required to defeat coverage.

g. This Plan does not apply to any CLAIM made by:

(1) YOUR present, former, or prospective partner or employee, or

(2) A present, former, or prospective officer, director, or stockholder employee of a professional corporation in which you were a shareholder,

unless such CLAIM arises out of YOUR conduct in an attorney-client capacity.

COMMENTS

WE do not always cover YOUR conduct in relation to YOUR past, present, or prospective partners, employees and fellow-shareholders even if such conduct arises out of a COVERED ACTIVITY. Coverage is limited by this exclusion to YOUR conduct in relation to such persons to situations where YOU are acting as their attorney and they are YOUR client.

h. This Plan does not apply to any CLAIM based upon or arising out of any business transaction subject to DR 5-104(A) in which YOU participate with a client unless a disclosure in the form of Disclosure Form DR 5 attached as Exhibit A to this Plan has been properly executed prior to the occurrence giving rise to the CLAIM and forwarded to US in a timely manner.

COMMENTS

Form DR 5. Fonn DR 5, referred to above, is attached to this Plan following Section XIV. The form includes an explanation of DR 5-104(A) prepared by General Counsel for the Oregon State Bar.

Applicability of Exclusion. When an attorney engages in a business transaction with a client, the attorney is under an ethical duty to make certain disclosures to the client. See DR 5-104(A). WE are not in the business of interpreting disciplinary rules and this exclusion is not intended to constitute an interpretation of DR 5-104(A). Instead, WE are invoking the body of law interpreting DR 5-104(A) to define when the exclusion is applicable.

Use of Our Form Not Mandated. Because of the obvious conflict of interest and the high duty placed upon attorneys, where the exclusion is applicable the attorney is nearly always determined to be liable when things go wrong. The only effective defense is to show that the attorney has made full disclosure. Form DR 5 is OUR attempt to set out an effective disclosure which will provide an adequate defense to such claims. WE are sufficiently confident that this disclosure will be effective to agree that the exclusion will not apply if YOU use OUR proposed form. YOU are free to use YOUR own form in lieu of OUR form, but if YOU do so YOU proceed at YOUR own risk, *i.e.*, if YOUR disclosure is less effective than OURS, the exclusion will apply. Use of OUR form is not intended to assure YOU of compliance with the ethical requirements applicable to YOUR particular circumstances. It is YOUR responsibility to consult DR 5-104(A) and add any disclosures necessary to satisfy the disciplinary rules.

Timing of Disclosure. To be effective, it is important that WE can prove the disclosure was made prior to entering into the business transaction. Therefore, the disclosure should be reduced to writing and signed prior to entering into the transaction. There may be limited situations in which reducing the required disclosure to writing or delivering it to US prior to entering into the transaction is impractical. In those circumstances, execution or delivery after entry into the transaction will not render the exclusion effective provided the execution takes place while the client still has an opportunity to withdraw from the transaction and the effectiveness of the disclosure is

not compromised. Additional language may be necessary to render the disclosure effective in these circumstances.

Retroactivity. This exclusion does not apply to business transactions with a client occurring prior to January 1, 1987, provided at the time YOU entered into the business transaction you complied with the then applicable exclusion. See exclusion 16 of the 1984, 1985 and 1986 PLF Plans.

---

i. This Plan does not apply to any CLAIM based upon or arising out of any act, error or omission committed by YOU (or by someone for whose conduct YOU are legally liable) while in the course of rendering INVESTMENT ADVICE if the INVESTMENT ADVICE is in fact either the sole cause or a contributing cause of any resulting damage. However, if all INVESTMENT ADVICE rendered by YOU constitutes a COVERED ACTIVITY described in paragraph 3 of Section III, this exclusion shall not apply unless part or all of such INVESTMENT ADVICE is described in paragraphs d, e, f or g of the definition of INVESTMENT ADVICE.

COMMENTS

WE have suffered extreme losses as a result of attorneys engaging in investment advice activity. It was never intended that the Plan cover such activities. Since 1984, the Plan has contained an investment advice exclusion. See, *e.g.*, exclusion 17 of 1986 Plan. Nevertheless, losses have continued in situations where the COVERED PARTY has rendered both investment advice and legal advice. In addition, some claims have resulted where the attorney has provided investment advice in the guise of legal advice.

Exclusion i. represents a totally new approach to this problem. Instead of excluding all investment advice, WE have clearly delineated specific activities which will not be covered whether or not legal as well as investment advice is involved. These specific activities are defined in Section IV under the definition of INVESTMENT ADVICE. OUR choice of delineated activities was dictated by specific cases which exposed US in situations never intended to be covered. WE are cognizant that litigation attorneys doing structured settlements and attorneys in business practice and tax practice legitimately engage in the rendering of general investment advice as a part of their practice. In delineating the activities to be excluded WE have attempted to retain coverage for these legitimate practices. For example, the last sentence of the exclusion permits coverage for certain activities normally undertaken by conservators and personal representatives (i.e. COVERED ACTIVITIES described in paragraph 3 of Section III) when acting in that capacity even though the same activities would not be covered if performed in an attorney-client capacity.

The exclusion applies whether the COVERED PARTY is directly or vicariously liable for the INVESTMENT ADVICE.

WE have the burden of proving that the activity involved is INVESTMENT ADVICE. The party asserting coverage has the burden of proving the last sentence of the exclusion renders it inapplicable to the activity involved.

[PERSONAL RELATIONSHIP AND BENEFITS EXCLUSIONS]

j. This Plan does not apply to any CLAIM for damages or the recovery of funds, property or fees which have or will accrue directly or indirectly to the benefit of any COVERED PARTY.

COMMENTS

None.

k. This Plan does not apply to any CLAIM asserted by YOUR spouse, parent, child or any member of YOUR household.

COMMENTS

None.

[SPECIAL CAPACITY EXCLUSIONS]

l. This Plan does not apply to any CLAIM arising out of a COVERED ACTIVITY described in paragraph 3 of Section III unless the CLAIM is brought by or for the benefit of the beneficiary of the fiduciary relationship and arises out of a breach of that relationship.

COMMENTS

Paragraph 3 of Section III provides coverage for YOUR acts as a personal representative, administrator, conservator, executor, guardian or trustee. See the referenced paragraph for details of this coverage.

m. This Plan does not apply to any CLAIM arising out of YOUR activity as a fiduciary under any employee retirement, deferred benefit, or other simular plan.

COMMENTS

None.

n. This Plan does not apply to any CLAIM arising out of notarized certification or acknowledgement of a signature without the physical appearance before such notary public unless such CLAIM arises from the acts of YOUR employee and YOU have no actual knowledge of such act.

COMMENTS

None.

[GOVERNMENT ACTIVITY EXCLUSION]

o. This Plan does not apply to any CLAIM arising out of YOUR conduct as an officer, employee, or agent, whether elective or appointive, of a public body which comes within the defense and indemnity requirements of ORS 30.285 and ORS 30.287. If a public body rejects the defense and indemnity of such a CLAIM, WE will provide coverage for such COVERED ACTIVITY and will be subrogated to all YOUR rights against the public body for recovery of OUR CLAIMS EXPENSE.

COMMENTS

None.

[HOUSE COUNSEL EXCLUSION]

p. This Plan does not apply to any CLAIM arising out of YOUR conduct as an employee in an employer-employee relationship other than YOUR conduct as an employee for an Oregon law professional corporation.

COMMENTS

The term "Oregon law professional corporation" as used in this provision refers to an Oregon corporation or partnership engaged solely in the practice of law.

[GENERAL TORTIOUS CONDUCT EXCLUSIONS]

q. This Plan does not apply to any CLAIM for bodily injury, PERSONAL INJURY, ADVERTISING INJURY, sickness, disease or death of any person, or injury to, or loss of or destruction of any property or loss of use thereof, or mental anguish or emotional distress in connection with such CLAIM.

COMMENTS

The claims excluded are not typical errors-and-omissions torts and were, therefore, considered inappropriate for coverage under the Plan. YOU are encouraged to seek coverage for these claims through commercial insurance markets.

r. This Plan does not apply to any CLAIM based upon or arising out of harassment or discrimination by YOU on the basis of race, creed, age, sex, physical or mental handicap, or sexual preference unless such CLAIM arises out of YOUR professional service in an attorney-client relationship.

COMMENTS

The claims excluded are not typical errors-and-omissions torts and were, therefore, considered inappropriate for coverage under the Plan.

[PATENT EXCLUSION]

s. This Plan does not apply to any CLAIM based upon or arising out of professional services rendered or any act, error or omission committed in relation to the registration of patents.

COMMENTS

None.

4. Option to Extend Claims Reporting Period

YOU can obtain continuing coverage under this Plan for YOUR COVERED ACTS committed prior to the end of the COVERAGE PERIOD by giving notice to US not later than 60 days after the end of the COVERAGE PERIOD and making payment of an additional assessment as determined by US within 30 days from receipt of billing from US. Any extension granted under this paragraph shall not increase the LIMITS OF COVERAGE available under this Plan.

COMMENTS

This paragraph sets forth YOUR right to extend the reporting period within which a claim must be made. Exercise of YOUR rights hereunder does not increase or reinstate the limits available to YOU. WE are aware that lifetime limits of $300,000 may be inadequate and are considering offering to those who satisfy specific underwriting criteria an opportunity to reinstate limits for an additional charge. WE have determined that WE can properly underwrite on a selective basis such coverage for persons no longer engaged in the private practice of law.

SECTION II — WHO IS A COVERED PARTY

1. The following are COVERED PARTIES:

   a. YOU.

   b. In the event of YOUR death, adjudicated incapacity, or bankruptcy, YOUR conservator, guardian, trustee in bank ruptcy, legal or personal representative but only when acting in such capacity.

   c. Any person, firm or corporation legally liable for your COVERED ACTIVITIES, but only to the extent such legal inability arises from YOUR COVERED ACTIVITIES.

2. Notwithstanding paragraph 1, any business enterprise (except an Oregon law professional corporation) and any partner, proprietor, officer, director, stockholder or employee of such enterprise is not a COVERED PARTY.

COMMENTS

The term "Oregon law professional corporation" as used in this provision refers to an Oregon corporation or partnership engaged solely in the practice of law.

SECTION III — WHAT IS A COVERED ACTIVITY

The following are COVERED ACTIVITIES:

[YOUR CONDUCT]

1. Any act, error or omission committed by YOU which satisfies all of the following criteria:

   a. YOU committed the act, error or omission in rendering professional services in YOUR capacity as an attorney, or in failing to render professional services that should have been rendered in YOUR capacity as an attorney.

   b. At the time YOU rendered or failed to render these professional services:

      (1) YOUR principal office was located within the state of Oregon, and

      (2) YOU were licensed to practice law in the state of Oregon, and

      (3) such activity occurred after any Retroactive Date shown in the Declarations.

[CONDUCT OF OTHERS]

2. Any act, error or omission committed by a person for whom YOU are legally liable in YOUR capacity as an attorney; provided at the time of the act, error or omission each of the following criteria was satisfied:

   a. The act, error or omission causing YOUR liability:

      (1) arose while YOU were licensed to practice law in the state of Oregon, and

      (2) arose while YOUR principal office was located within the state of Oregon, and

      (3) occurred after any Retroactive Date shown in the Declarations.

   b. The act, error or omission, if committed by YOU, would constitute the rendering of professional services.

   c. The act, error or omission was not committed by an attorney who at the time of the act, error or omission:

(1) maintained his or her principal office outside the state of Oregon, and

(2) was in an "Of Counsel" relationship with YOU or with a professional corporation in which YOU were a shareholder, or was YOUR employee, partner, fellow shareholder in a professional corporation, or was an employee of a professional corporation in which YOU were a shareholder.

[YOUR CONDUCT IN A SPECIAL CAPACITY]

3. Any act, error or omission committed by YOU in YOUR capacity as a personal representative, administrator, conservator, executor, guardian or trustee; provided, at the time of the act, error or omission, each of the following criteria was satisfied:

   a. YOUR principal office was located within the state of Oregon, and

   b. YOU were licensed to practice law in the state of Oregon, and

   c. such activity occurred after any Retroactive Date shown in the Declarations.

COMMENTS

COVERED ACTIVITIES have been divided into three categories. Subparagraph 1 deals with coverage for YOUR conduct as an attorney. Subparagraph 2 deals with coverage for YOUR liability for the conduct of others. Subparagraph 3 deals with coverage for YOUR conduct in a special capacity (e.g. as a personal representative of an estate).

WE have consciously used the term "special capacity" rather than "fiduciary" to avoid any implication this coverage includes fiduciary obligations other than those specifically identified.

The statute authorizing the establishment of the PLF mandates coverage for attorneys engaged in the "private practice of law in Oregon." While the definition of COVERED ACTIVITY incorporates many of the criteria used to define "private practice of law in Oregon," WE have consciously avoided using or defining that term in the Plan because questions concerning who is exempt from the statutorily mandated coverage are different from questions concerning what activity is covered under the Plan.

This Section introduces the concept of a Retroactive Date. No Retroactive Date will be applicable to any attorney who has held coverage with US continuously since the inception of the PLF. Attorneys who first obtained coverage with US at a later date and attorneys who have interrupted coverage will find in the Declarations a Retroactive Date. This date will be the date on which YOUR most recent period of continuous coverage commenced. WE do not cover CLAIMS arising out of conduct prior to the Retroactive Date.

SECTION IV — DEFINITIONS

Throughout this Plan, when appearing in capital letters:

1. The word "ACTION" refers to any legal or equitable proceedings (including arbitration, mediation or similar proceeding) seeking money damages.

2. The words "ADVERTISING INJURY" refer to injury based upon or arising out of one or more of the following offenses:

   a. oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

   b. oral or written publication of material that violates a person's right of privacy;

   c. misappropriation of advertising ideas or styles of doing business; or

   d. infringement of copyright, title or slogan.

3. The word "CLAIM" refers to any ACTION or demand for money damages.

4. The words "CLAIMS EXPENSE" refer to:

   a. fees charged by any attorney designated by US;

   b. all other fees, costs and expenses resulting from the investigation, adjustment, defense and appeal of a CLAIM, if incurred by US;

   c. fees charged by any attorney designated by the COVERED PARTY with our written consent.

   However, CLAIMS EXPENSE does not include OUR costs for salaries of regular employees or of officials or OUR other routine administrative costs.

5. The words "COVERAGE PERIOD" refer to the coverage period shown in the Declarations under the heading "COVERAGE PERIOD."

6. The words "INVESTMENT ADVICE" refer to any of the following activities:

   a. YOUR advising any person, firm or corporation respecting the value of a particular investment, or recommending investing in, purchasing or selling a particular investment.

b. YOUR managing any investment.

c. YOUR buying or selling any investment for another.

d. YOUR acting as a broker for a borrower or lender.

e. YOUR issuing or promulgating any economic analysis of any investment.

f. YOUR giving advice of any nature where your compensation for such advice is in whole or in part contingent or dependent upon the success or failure of a particular investment.

g. YOUR inducing someone to make a particular investment.

7. The words "PERSONAL INJURY" refer to injury based upon or arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. Wrongful entry or eviction of a person from a room, dwelling or premises that the person occupies.

d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or

e. Oral or written publication of material that violates a person's right of privacy.

COMMENTS

None.

SECTION V — LIMITS OF COVERAGE AND DEDUCTIBLE

1. OUR maximum liability is $300,000 for indemnity and CLAIMS EXPENSE for all CLAIMS first made during the COVERAGE PERIOD. This $300,000 includes any amounts the COVERED PARTY is obligated to pay as a deductible. The making of CLAIMS against more than one COVERED PARTY shall not increase OUR LIMITS OF COVERAGE.

2. The COVERED PARTY is obligated to pay any deductible shown in the Declarations. This amount shall be paid by the COVERED PARTY within 10 days after written demand from US.

COMMENTS

WE now have a single limit of coverage of $300,000 which is applicable to all claims for indemnity and claims expense during the COVERAGE PERIOD. CLAIMS EXPENSE specifically includes attorneys fees.

The limits of coverage apply to claims against more than one COVERED PARTY so that naming all partners, fellow-shareholders or associates of a COVERED PARTY does not increase the amount available.

An example illustrating the application of subparagraph 1 follows. The example assumes a total loss of $350,000 consisting of $285,000 paid to the claimant, $5000 paid to defense counsel appointed by US, and an applicable deductible of $10,000. This loss would be paid as follows:

1.	$285,000	— to claimant.
2.	5,000	— to defense counsel.
	$290,000	— total paid by US.
3.	$ 10,000	— YOUR deductible.
4.	50,000	— loss in excess of $300,000 limit.
	$ 60,000	— total paid by YOU.

SECTION VI — RELATION TO OTHER PLANS ISSUED BY US

When this Plan together with other Plans issued by US apply to the same CLAIM or CLAIMS, OUR $300,000 limit for indemnity and CLAIMS EXPENSE is the maximum amount available for all CLAIMS first made during the COVERAGE PERIOD regardless of the number of Plans which may apply.

COMMENTS

WE issue Plans to all lawyers in the state of Oregon engaged in the private practice of law. As a consequence, WE find ourselves defending more than one lawyer both in situations where lawyers from different firms have participated in the handling of the same case and in situations where one or more lawyers from the same firm have handled a case and the other lawyers in the firm are alleged to be vicariously liable for this conduct. In all these situations, WE have determined it is inappropriate for US to extend more than one limit. Accordingly, WE have provided that there is only one $300,000 limit available for all claims first made during any coverage period regardless of the number of Plans which may apply to that particular claim or set of claims. In short, whenever a claimant or group of claimants assert the same or related claims, OUR entire liability is limited to a total of $300,000 regardless of the number of Plans WE have issued.

SECTION VII — NOTICE OF CLAIMS

1. The Covered Party shall, as a condition precedent to the right of protection afforded by this coverage, give US, at the address shown in the Declarations, as soon as practicable, written notice of any CLAIM made against the COVERED PARTY.

2. In the event an ACTION is brought against the COVERED PARTY, the COVERED PARTY shall immediately notify and deliver to US, at the address shown in the Declarations, every demand, notice, summons or other process received by the COVERED PARTY or the COVERED PARTY'S representatives.

3. If during the COVERAGE PERIOD, the COVERED PARTY becomes aware of a specific act, error or omission for which coverage is provided under this Plan, and if the COVERED PARTY shall during the COVERAGE PERIOD give written notice to US of:

   a. The specific act, error or ommision; and

   b. The injury or damage that has or may result; and

   c. The circumstances by which the COVERED PARTY first became aware of such act, error or omission;

   then any CLAIM that is subsequently made against the COVERED PARTY based upon or arising out of such act, error or omission shall be deemed to have been made during the COVERAGE PERIOD.

COMMENTS

None.

SECTION VIII — COVERAGE DETERMINATIONS

1. Any dispute as to the applicability of this Plan between the COVERED PARTY (or anyone claiming through the COVERED PARTY) and US shall be determined by arbitration. Arbitration shall be pursuant to the arbitration rules of the Multnomah County Circuit Court but without limitation as to the amount in controversy and without right of appeal except for such appeal as is provided by ORS 33.340.

2. If we defend under a reservation of rights respecting the applicability of this Plan to the CLAIM, the COVERED PARTY who is the recipient of the reservation shall not be entitled to demand settlement of the CLAIM for any amount until all applicable coverage issues have been finally determined by agreement, award or judgment.

COMMENTS

In order to reduce expense and facilitate prompt resolution of disputes concerning coverage a timely procedure is necessary. Use of arbitration is the preferred method. Therefore, unless YOU have elected to pay an additional assessment to purchase an endorsement deleting paragraph 1 of this section, YOU and anyone else claiming coverage under this Plan are obligated to proceed in arbitration. This obligation extends not only to the party seeking coverage, but anyone claiming through them. Thus, if a COVERED PARTY should suffer a judgment and the judgment creditor seeks to garnish US or proceed in a direct action against US or assert a declaratory action against US seeking a determination that WE have coverage, the judgment creditor must proceed in arbitration.

Where a coverage dispute exists and WE defend a claim against a COVERED PARTY under a reservation of rights the use of arbitration should resolve the coverage dispute in a reasonable time. During the pendency of the arbitration the COVERED PARTY may not demand settlement. This provision is included to encourage prompt resolution of coverage issues so that the parties to the litigation can readily determine who should respond to the claimant.

SECTION IX — ASSISTANCE, COOPERATION AND DUTIES OF COVERED PARTY

1. As a condition of coverage under this Plan, the COVERED PARTY shall cooperate with US and shall:

   a. Provide to US within 30 days after written reque[illegible] sworn statements providing full disclosure concerning any CLAIM or any aspect thereof,

   b. Attend and testify when requested by US,

   c. Furnish to US within 30 days after written request, all files, records, papers and documents which may relate to any ACTION against the COVERED PARTY,

   d. Execute authorizations, documents, papers, loan receipts, releases or waivers when so requested by US,

   e. Submit to arbitration of any CLAIM when requested by US,

   f. Permit US to cooperate and coordinate with any excess or umbrella insurance carrier as to the investigation, defense and settlement of all CLAIMS,

   g Not communicate with any person other than US or an insurer for the COVERED PARTY regarding any CLAIM that has been made against the COVERED PARTY, after notice to the COVERED PARTY of such CLAIM, without OUR written consent,

   h. Assist US in bringing any subrogation or similar claim. OUR subrogation or similar rights will not be asserted against any employee, investigator, legal assistant, partner, fellow shareholder or associate of any COVERED PARTY except for claims arising from intentional, dishonest, fraudulent or malicious conduct of such person.

2. The COVERED PARTY shall not, except at his or her own cost, voluntarily make any payment, assume any obligation, or incur any expense.

COMMENTS

The obligations of the COVERED PARTY under this section as well as the other sections of the Plan are to be performed without charge to US.

SECTION X — ACTION AGAINST US

No ACTION shall be brought against US unless the COVERED PARTY has fully complied with all terms of this Plan.

COMMENTS

None.

SECTION XI — SUPPLEMENTAL ASSESSMENTS

If the accumulated annual assessments and any earnings thereon are insufficient to pay OUR due and owing judgments, awards, settled CLAIMS and current expenses at the end of any 90-day period, WE are authorized to and shall further assess YOU YOUR pro rata share of the total assessed sum necessary to satisfy the outstanding obligations and provide future operating expenses until the date of the next general assessment.

WE are authorized to make additional assessments against YOU for this COVERAGE PERIOD until all OUR liability for this COVERAGE PERIOD is terminated, whether or not YOU are a COVERED PARTY under a Plan issued by us at the time the assessment is imposed.

COMMENTS

This section is limited to a statement of YOUR contractual obligation to pay supplemental assessments should the assessments originally levied be inadequate to pay all CLAIMS, CLAIMS EXPENSE and other expenses. It is not intended to cover other assessments levied by US such as the regular assessment YOU initially paid to purchase this Plan or any special underwriting assessment levied against YOU.

SECTION XII — RELATION OF OUR COVERAGE TO INSURANCE COVERAGE OR OTHER COVERAGE

If the COVERED PARTY has valid and collectible insurance coverage or other obligation to indemnify which also applies to any loss or CLAIM covered by this Plan, WE shall not be liable under the Plan until the limits of the COVERED PARTY'S insurance or other obligation to indemnify, including any applicable deductible, have been exhausted, unless such insurance or other obligation to indemnify is written only as specific excess coverage over the LIMITS OF COVERAGE of this Plan.

COMMENTS

This Plan is not an insurance policy. To the extent that insurance or other coverage exists, this Plan may not be invoked. This provision is designed to preclude the application of the other insurance law rules applicable under the *Lamb-Weston* doctrine.

SECTION XIII — WAIVER AND ESTOPPEL

Notice to or knowledge of OUR representative, agent, employee or any other person shall not effect a waiver, constitute an estoppel or be the basis of any change in any part of this Plan nor shall the terms of this Plan be waived or changed except by written endorsement issued and signed by OUR authorized representative.

COMMENTS

None.

SECTION XIV — ASSIGNMENT

The interest hereunder of any COVERED PARTY is not assignable.

COMMENTS

None.

Form DR 5

[Date]

_____

_____

_____

_____

RE: _____

Dear _____:

Because I am entering into this business venture with you, I am required by ethical and professional liability protection requirements to point out to you the possibility of conflicts in our interests. The enclosed article explains those considerations in some detail.

Whether or not I perform services of a legal nature for our business venture, there always exists the possibility of a conflict. You are advised that you should have independent counsel representing you in this business venture.

Please sign the enclosed copy of this letter, where indicated, acknowledging receipt of this letter and enclosure.

Very truly yours,

_____

I acknowledge receipt of this letter and enclosure:

_____ _____

[date] [client's name]

Enclosure: BUSINESS DEALS CAN CAUSE PROBLEMS (complying with DR5-104(A)) by Jeffrey D. Sapiro (Reprinted from "Oregon State Bar Bulletin," June, 1981).

BUSINESS DEALS CAN CAUSE PROBLEMS

(complying with DR5-104(A))

Something that clients often lose sight of is that attorneys are not only legal advisors, but are business people as well.

It is no secret that most practitioners wish to build a successful practice, rendering quality legal services to their clients, as a means of providing a comfortable living for themselves and/or their families. Given this objective, it is not surprising that many attorneys are attracted to business opportunities *outside* their practices that may prove to be financially rewarding. The fact that these business opportunities are often brought to an attorney's attention by a client or through involvement in a client's financial affairs is reason to explore the ethical problems that may arise.

Disciplinary Rule 5-104(A) reads as follows:

> DR 5-104 *Limiting Business Relations with a Client.*
> (A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

The rationale behind this rule should be obvious. An attorney has a duty to exercise professional judgment solely for the benefit of a client, independent of any conflicting influences or loyalties (EC 5-1). If an attorney is motivated by financial interests adverse to that of the client, the undivided loyalty due to the client may very well be compromised. (See also DR 5-101 and DR 5-103.)

A particularly dangerous situation is where the attorney not only engages in the business aspect of a transaction, but also furnishes the legal services necessary to put the deal together. In *In re Brown*, 277 Or 121, 559 P2d 884, reh. den. 277 Or 731, 561 P2d 1030 (1977), an attorney became partners with a friend of many years in a timber business, the attorney providing the legal services and the friend providing the capital. The business later incorporated, with the attorney drafting all corporate documents, including a buy-sell agreement permitting the surviving stockholder to purchase the other party's stock. The Oregon Supreme Court found that the interests of the parties were adverse for a number of reasons, including the disparity in capital invested and the difference in the parties' ages, resulting in a potential benefit to the younger attorney under the buy-sell provisions. Despite the fact that the friend was an experienced businessman, the court held that the attorney violated DR 5-104(A) because the friend was never advised to seek independent legal advice.

Even in those situations where the attorney does not furnish legal services, problems may develop. There is a danger that, while the attorney may feel he or she is merely an investor in a business deal, the client may believe the attorney is using his or her legal skills to protect the client's interests in the venture. Indeed, this may be the very reason the client approached the attorney with a business proposition in the first place.

In order to avoid the ethical problems addressed by DR 5-104(A), the Supreme Court has said that an attorney must *at least* advise the client to seek independent legal counsel. (*In re Bartlett*, 283 Or 487, 584 P2d 296 [1978]). The attorney should disclose not only that a conflict of interest may exist, but should also explain the nature of the conflict "in such detail so that (the client) can understand the reasons why it may be desirable for each to have independent counsel . . ." (*In re Boivin*, 271 Or 419, 424, 533 P2d 171 [1975]). Such a disclosure will help insure that there is no misunderstanding over the role the attorney is to play in the transaction and will help prevent the attorney from running afoul of the disciplinary rule discussed above.

This article first appeared in the Oregon State Bar Bulletin, June 1981.

Jeffrey D. Sapiro
Assistant General Counsel
Oregon State Bar

[Editor's Note: In July, 1982, Jeff Sapiro wrote another article for the "OSB Bulletin" describing an increase in disciplinary proceedings for violations of DR 5-104(A) and discussing and citing several recent Supreme Court opinions involving this subject. A review of that article should be very helpful, as well as reading those cases cited therein, particularly the case of *In re Drake*, 292 Or 704 (1982) which provides a comprehensive analysis of DR 5-104(A).]